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Errors in the translation of the Provisional Criminal Code of Kosovo violate the principle of legal certainty and may result in violations of the principle of legality

The OSCE Mission in Kosovo (OSCE) is concerned that errors in the Albanian translation of the Provisional Criminal Code of Kosovo (“Criminal Code”)¹ violate the right to legal certainty, and may result in violations of the principle of legality.

Legal provisions which interfere with individual rights must be adequately accessible and formulated with sufficient precision to enable individuals to regulate their conduct. According to the European Court of Human Rights, legal provisions containing criminal offences should therefore be drafted in a way that the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation, what acts and omissions can make him liable.²

However, the OSCE has discovered instances where the Albanian translation of the Criminal Code differs from the English version, which prevails in the event of a conflict³:

Article 297(1) of the Criminal Code punishes “Whoever violates the law on public traffic and endangers public traffic, human life or property on a large scale and thereby causes [...] material damage exceeding 15,000 euro [...].” The Albanian version reads “1,000 euro.” (emphasis added)⁴

Article 208(3) of the Criminal Code, in the English version, establishes an aggravated punishment for the offence of “cohabiting with persons under the age of sixteen years in extramarital community” if the offence is committed against a person “under the age of fourteen years.” The Albanian version reads “under the age of *sixteen years*.” (emphasis added)⁵

The English version of the Criminal Code⁶ is authoritative,⁷ and criminal proceedings can be conducted in the English language.⁸ In any case, residents of Kosovo can be

¹ UNMIK Regulation No. 2003/25 on the Provisional Criminal Code of Kosovo, promulgated on 6 July 2003.

² See European Court of Human Rights, *Kokkinakis v. Greece*, 14307/88, Judgment, 25 May 1993, paragraph 52.

³ Article 356 of the Criminal Code.

⁴ Of note, if a judge relies on the Albanian version of the provision, he/she could convict a defendant for causing damage of only 1,000 euro. This would violate the principle of legality, since the authoritative English version punishes only those who cause damage exceeding 15,000 euro.

⁵ In the Albanian version of the Article 208 there is therefore no difference between paragraph 1 and 3, in that both describe sixteen years as the age of the victim. This makes it unclear which punishment (under paragraph 1 or 3) the judge should apply.

⁶ In addition, the OSCE is concerned about the inaccurate Albanian translation of some provisions of the Provisional Criminal Procedure Code of Kosovo (promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, “Criminal Procedure Code”). For example, Article 306(5) of the Criminal Procedure Code states in the English version that the three-judge panel shall “ask” whether there are still reasons for detention on remand. The Albanian version states that the panel shall “observe” *ex officio* whether the grounds for detention still exist. In addition, Article 306(4) states that the court shall decide “immediately” and no later than 48 hours. The word “immediately” does not occur in the Albanian version.

reasonably expected to rely only on the Albanian or Serbian⁹ versions of the law as that is their primary language. As local courts and prosecution offices often do not have English, Albanian and Serbian interpreters, and many officials do not understand English, the courts cannot be expected to resolve the translation conflicts.

In summary, these translation errors not only cause legal uncertainty, but also may result in inequality of treatment,¹⁰ or a violation of the principle of legality.¹¹

In light of the above, the OSCE recommends that:

- The relevant authorities at UNMIK responsible for publishing the UNMIK Official Gazette should ensure that the Albanian and Serbian translations of the Criminal Code and Criminal Procedure Code exactly correspond to the official English version.
- Judges and prosecutors should apply the English version of Article 297(1) and 208(3) of the Criminal Code, until the Albanian translation of the code is corrected.

Civil courts fail to examine *ex officio* their jurisdiction according to the legal requirements

The OSCE is concerned that civil courts in Kosovo have on occasion failed to examine their jurisdiction *ex officio* in cases where the Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters (“the Special Chamber”) has primary or exclusive jurisdiction. This not only violates domestic procedural law, but also may violate the right to be heard by a tribunal established by law.¹²

Under applicable civil procedure, “[i]mmediately upon receipt of the pleadings, the court shall *ex officio* assess whether it is competent to judge that particular case [...]”¹³ “When during the proceedings, the court determines that the case falls neither within the jurisdiction of a court of record [...], but that it falls within the jurisdiction of some other domestic or foreign body, it shall declare itself as not competent, cancel

⁷ According to Article 356 of the Criminal Code, “The English, Albanian and Serbian language versions of the present Code are equally authentic. In case of conflict, the English language version shall prevail.”

⁸ Article 15(1), Criminal Procedure Code.

⁹ The Serbian translation of all the described provisions is accurate. However, the OSCE cannot exclude that there may be mistakes in the Serbian translation of the Criminal Code and/or Criminal Procedure Code.

¹⁰ Depending on whether a defendant is tried by an English-speaking, Serbian-speaking, or Albanian-speaking Court, different substantive and procedural provisions may be applied.

¹¹ See e.g., footnote 2.

¹² See Article 14(1) of the International Covenant on Civil and Political Rights and Article 6(1) of the European Convention on Human Rights.

¹³ “The assessment of jurisdiction is done on the grounds of the counts of the charges, and on the grounds of the facts known to the court.” See Article 15(1) and (2) of the Law on Contested Procedure (Official Gazette 4/77 and its subsequent amendments). Moreover, throughout the proceedings, the court *ex officio* shall pay attention to whether the resolution of the dispute lays within the court’s jurisdiction. See Article 16(1) of the Law on Contested Procedure.

already conducted actions in the proceedings, and dismiss the claims.”¹⁴ Once the court pronounces itself non-competent, it shall assign the case to the competent court or body.¹⁵

UNMIK Regulation No. 2002/13 On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters outlines in Section 4.1 the Special Chamber’s primary jurisdiction. This includes claims brought against an enterprise or corporation currently or formerly under the administrative authority of the Kosovo Trust Agency. Although the Special Chamber may refer specific claims to any court having the required subject matter jurisdiction, “no court in Kosovo shall exercise jurisdiction over a claim involving the subject matter described in Section 4.1 unless such claim has been referred to it [...]”¹⁶

Despite these clear provisions, the following cases demonstrate the failure of courts to appropriately assess their jurisdiction and refer the case to the competent body.

In a property dispute before a Municipal Court against a Socially Owned Enterprise under the administrative authority of the Kosovo Trust Agency, the court decided in the preliminary hearing on 21 February 2006 to proceed with this case without assessing its jurisdiction.¹⁷ The court scheduled the first main session on 7 March 2006 and issued a judgment on 3 May 2006.

In a labour dispute a Municipal Court against a Publicly Owned Enterprise under the administrative authority of the Kosovo Trust Agency, the court held four trial sessions¹⁸ and subsequently issued a judgment, which was appealed to the District Court on 22 September 2005.¹⁹

In both examples, the courts did not correctly assess their competence to hear the dispute. Since both suits involved claims against enterprises under the administrative authority of the Kosovo Trust Agency, the courts should have dismissed the claims and referred them to the Special Chamber. By hearing a case outside their jurisdiction, the courts violated domestic law and possibly international human rights standards.²⁰ In light of the above, the OSCE recommends that:

¹⁴ Article 16(2) of the Law on Contested Procedure. According to Article 354(2) and (3) of the Law on Contested Procedure, a decision that has been made in a case that was not within the jurisdiction of that court is a substantial breach of the procedure and ground for appeal against a decision.

¹⁵ Article 21(1) of the Law on Contested Procedure.

¹⁶ Section 4.2 of UNMIK Regulation No. 2002/13, On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, promulgated on 13 June 2002. In instances where the matter has been referred by the Special Chamber to a local court, the decision of this court may be appealed only to the Special Chamber. See Section 4.3 of UNMIK Regulation No. 2002/13.

¹⁷ On the same date, the court ordered that the Kosovo Trust Agency should be notified about the case.

¹⁸ Dated 17 January, 10 February, 10 March, and 4 May 2005.

¹⁹ As of 14 January 2008, the case is still on appeal.

²⁰ See, e.g., Article 14(1) of the International Covenant on Civil and Political Rights and Article 6(1) of the European Convention on Human Rights, where the Special Chamber in its discretion refers cases to a Municipal Court, the competence of the court of appeal differs. If the Special Chamber had primary jurisdiction but referred the case to the local court, only the Special Chamber may hear the appeal. In contrast, where the local court has primary jurisdiction, a party may appeal to the District Court.

- Courts should carefully assess their own competence before hearing claims involving Socially Owned Enterprises to ensure they do not accept cases falling within the primary or exclusive jurisdiction of the Special Chamber.
- The Kosovo Judicial Institute should train judges on the jurisdiction of the Special Chamber.